No. 86-1587

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1986

JOSEPH TOUSSAINT, et al.,
Petitioners,

v.

DANIEL J. McCARTHY, et al.,
Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether summary affirmance vests in this Court exclusive and original jurisdiction to modify, after changes in the controlling law wrought by this Court or the repeal of pertinent state administrative regulations, an injunction which prescribes due process for state prison administrative segregation proceedings.

2. Whether the Court of Appeals' modification of a ten-year-old injunction prescribing procedures for state prison administrative segregation decisions to conform it to the minimum procedures prescribed by this Court in Hewitt v. Helms, 459 U.S. 460 (1983) was an abuse of discretion.

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents, Daniel J. McCarthy, Director of the California Department of Corrections, Daniel Vasquez, Warden of San Quentin State Prison, and Robert Borg, Warden of Folsom State Prison, respectfully request that this Court deny the petition for writ of certiorari seeking review of the Ninth Circuit's opinion in this case.[1/]

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1. Respondents here are petitioners in No. 86-1588, in which a Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit was filed on March 30, 1987. Respondents urge this Court to deny the petition in this action, but assert that the issues they raise in No. 86-1588 warrant this Court's consideration.

That opinion is reported at 801 F.2d 1080 (9th Cir. 1986).

STATEMENT OF THE CASE

This civil rights action under 42 U.S.C. § 1983 concerns conditions and practices in administrative segregation housing units at San Quentin and Folsom State Prisons, the highest security housing units in two of California's maximum security state prisons. This action commenced in 1973, when prisoners housed in administrative segregation filed a civil rights complaint seeking improvement in their conditions of confinement.

In 1976, a three-judge district court issued the first significant ruling in this case, after adjudicating only administrative segregation procedures. In Wright v. Enomoto, 462 F.Supp. 397 (N.D.Cal. 1976), the three-judge court issued partial summary judgment after finding from declarations that the due process clause itself created a liberty

interest in remaining in a prison's general population. Id. at 402. The Wright decision then required state prison officials to provide prisoners placed in segregation with the procedural safeguards required for prison disciplinary proceedings by this Court in Wolff v. McDonnell, 418 U.S. 539 (1974). Consequently, state prison officials were ordered to provide prisoners placed in segregation with the following: (1) prior, detailed written notice of the reasons for placement in segregation; (2) an adversarial hearing within seventy-two hours of the placement in segregation; (3) representation by counsel-substitute when appropriate; (4) an opportunity to present witnesses and documentary evidence; (5) a written decision including reasons for the placement in segregation and references to supporting evidence. Wright v. Enomoto, 462 F.Supp. at 404-405. This Court summarily affirmed this result in Enomoto

v. Wright, 434 U.S. 1052 (1978). Over respondents' objections, the three-judge court dissolved on March 14, 1980.

In 1983, the district court issued another preliminary injunction governing both conditions of confinement and administrative segregation placement procedures.[2/] Toussaint v. Rushen, 553 F.Supp. 1365 (N.D.Cal. 1983). The preliminary injunction modified the Wright procedures and also applied them to administrative segregation retention decisions. Id. at 1386-1387. For the most part, the Ninth Circuit affirmed the preliminary injunction, but directed the district court, in passing on segregation prisoners' request for permanent injunctive relief, to reconsider its conclusion that the due process clause required the

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2. An earlier preliminary injunction governing conditions of confinement was issued by the district court in November 1980. The Court of Appeals vacated this injunction in March 1981. Wright v. Rushen, 642 F.2d 1129 (9th Cir. 1981).

extensive Wright procedures for segregation decisionmaking in light of this Court's decision in Hewitt v. Helms, 459 U.S. 460 (1983). Toussaint v. Yockey, 722 F.2d 1490, 1494, n. 6 (9th Cir. 1984).

Despite the Ninth Circuit's mandate, the district court continued and expanded even further the Wright procedures when it granted segregation prisoners permanent injunctive relief in October 1984. Toussaint v. McCarthy, 597 F.Supp. 1388, 1415-18 (N.D.Cal. 1984). The permanent injunction also required substantial improvements in the physical conditions in segregation housing units at San Quentin and Folsom.

The district court appointed a special master to oversee and report on compliance with its permanent injunction. The special master was also empowered to order the release of prisoners from segregation when he disagreed with prison officials' reasons

for placing or retaining prisoners there. Id. at 1421-1426.

Prison officials appealed several provisions of the permanent injunction governing conditions, but their appeal focused on the extensive permanent procedural requirements for administrative segregation placement and retention decisionmaking and the assumption and delegation of power to order prisoners released from segregation. In essence, prison officials asked the Ninth Circuit to do what it had previously directed the district court to do--reexamine the Wright administrative segregation procedures in light of Hewitt.

The Ninth Circuit recognized its authority to review closely an injunction permanently controlling the operation of maximum security housing units in maximum security prisons to ensure that the injunction required no more of state prison officials than that needed to cure consti-

tutional violations. Upon such review, the Court of Appeals conformed the permanent injunction's procedural safeguards to those required by this Court's decision in Hewitt. Toussaint v. McCarthy, 801 F.2d 1080, 1086-89, 1098-1101 (9th Cir. 1986).

The Court of Appeals ruled that it was appropriate to modify the injunction issued by the three-judge court in 1976, because this Court's more recent, reasoned opinion in Hewitt changed the applicable minimum requirements of due process, which previously had been taken from the summary affirmance of Wright. For this reason, the Ninth Circuit vacated the Wright order and the excessive procedural safeguards in the permanent injunction. Id. at 1114. The Court of Appeals also vacated the provision of the permanent injunction empowering the special master to order prisoners released from segregation. Id.

The prisoners then sought rehearing and rehearing en banc on issues similar to

those raised here. The Ninth Circuit denied the prisoners' request for rehearing and suggestion for rehearing en banc on December 31, 1986. Not a single judge in active service requested a vote to rehear the case en banc.

REASONS FOR DENYING THE WRIT

I

THE NINTH CIRCUIT'S DECISION MODIFYING A PERMANENT INJUNCTION TO REFLECT INTERVENING CHANGES IN THE LAW CORRECTLY APPLIES CONTROLLING DECISIONS OF THIS COURT AND DOES NOT RAISE ANY IMPORTANT, UNRESOLVED ISSUE OF LAW. NO FURTHER REVIEW IS WARRANTED.

The prisoners' petition contends that significant issues requiring resolution by this Court are raised by the Ninth Circuit's modification of a permanent injunction controlling state prison officials' administrative segregation decisionmaking in light of intervening changes in the law. Since the Court of Appeals applied clearly established law to its review of the permanent injunction in

this case, further review by this Court is not warranted.

As made clear by the Court of Appeals, it vacated the order of the three-judge district court in Wright v. Enomoto, 597 F.Supp. at 404-405, because intervening changes in the law required a different result from that ordered in Wright. Toussaint v. McCarthy, 801 F.2d at 1090-93. Those changes included this Court's decision in Hewitt v. Helms, 459 U.S. 460 (1983), specifying the due process safeguards required for administrative segregation decisions, and repeal of a state prison administrative regulation upon which Wright in part had been predicated. 801 F.2d at 1090-92.

This Court has made it clear that permanent injunctions are always subject to modification as intervening events may dictate. United States v. Swift & Co., 286 U.S. 106, 114-115 (1932). A change in the law is one event that may warrant

modification of a permanent injunction. System Federation No. 91 v. Wright, 364 U.S. 642, 647-48 (1961).

The prisoners claim, however, that this Court's summary affirmance of Wright precluded review of that order in light of the changes in the law noted by the Court of Appeals. The prisoners make this claim even though it is clear that the more recent and carefully reasoned decision in Hewitt, not the summary affirmance of Wright, specifies what due process must attend application of a state standard for removal of a prisoner from the general population to segregation. Thus, the prisoners contend that summary affirmance of Wright rendered the Court of Appeals powerless to conform lower court orders to the Constitution. Their contention would insulate the orders of the single district judge from any review by the Court of Appeals or impose on this overburdened Court the obligation of direct review.

The prisoners' contention overlooks the fact that summary affirmance of Wright did not signal this Court's agreement with the reasoning of the three-judge district court, Zobel v. Williams, 457 U.S. 55, 64, n. 13 (1982), or give any indication about its rationale for the affirmance, Mandel v. Bradley, 432 U.S. 173, 176 (1977). Also, the prisoners fail to recognize that, because of the summary affirmance of Wright, it was not at all unusual for this Court to give full consideration to the question of the extent of due process for administrative decisions in Hewitt. Washington v. Confederated Bands and Tribes of the Yakima Indian Nation, 439 U.S. 463, 476, n. 20 (1979).

Despite this Court's plenary consideration of this question in Hewitt, the prisoners suggest that the Court of Appeals' application in this case of Hewitt, instead of the three-judge court's earlier decision in Wright, raises serious

questions about the law of the case doctrine. The prisoners' concerns are misplaced.

As this Court has recognized, law of the case is an amorphous concept. This doctrine generally requires a court to continue to apply an earlier rule of law throughout a case. Arizona v. California, 460 U.S. 605, 618 (1983). Law of the case is an expression of the general practice of courts to refuse to reopen what has already been decided. Messinger v. Anderson, 225 U.S. 436, 444 (1912). The law of the case doctrine is not a limit on a court's jurisdiction. This doctrine does not preclude a court from reconsidering a question once decided. Arizona v. California, 460 U.S. at 618; Southern Ry. Co. v. Clift, 260 U.S. 316, 319 (1922). As the Ninth Circuit recognized, this is especially true in the case of a permanent injunction involving the day-to-day operation of a state prison system. Thus,

in light of subsequent changes in the governing law, the law of the case doctrine did not prohibit the Court of Appeals from following Hewitt instead of the summary affirmance of Wright.

Though amorphous, the law of the case doctrine has been discussed extensively by this and other courts. The Ninth Circuit's application of the well-developed law of the case principles to this case does not raise any important, unresolved question of federal law. Similarly, the Ninth Circuit's modification of the permanent injunction in this case in light of changes in the controlling law also does not raise any important, unresolved question of federal law requiring this Court's consideration. For these reasons, the petition for writ of certiorari should be denied.

II

THE COURT OF APPEALS' DECISION ABOUT THE DUE PROCESS REQUIREMENTS FOR ADMINISTRATIVE SEGREGATION PLACEMENT DECISIONS DOES NOT RAISE ANY ISSUE UNRESOLVED BY RECENT DECISIONS OF THIS COURT OR CONFLICT WITH ANY DECISION OF OTHER CIRCUIT COURTS OF APPEALS.

The prisoners' petition asserts that the Ninth Circuit's decision about the due process requirements for administrative segregation placement decisions creates a need for clarification of this Court's decisions in Hewitt v. Helms, 459 U.S. 460 (1983) and Superintendent, Massachusetts Correctional Institution v. Hill, 472 U.S. ____, 105 S.Ct. 2768 (1985). The prisoners' assertion is wrong.

In determining the quantum of due process required for administrative segregation placement decisions, the Court of Appeals in this case followed the path outlined by this Court in Hewitt. First, the Ninth Circuit considered whether California prisoners enjoyed a state-

created liberty interest in remaining in the general population. Toussaint v. McCarthy, 801 F.2d at 1089-98. When the Court of Appeals decided that state prison regulations created a liberty interest entitled to federal due process protection, id. at 1097-98, it then determined the quantum of process required by the Fourteenth Amendment to protect that interest, id. at 1009-1101. This was exactly the reasoning process used by this Court in Hewitt.

Not surprisingly, the Ninth Circuit ruled that California prisoners placed in segregation were entitled to the same measure of due process granted the Pennsylvania prisoners by this Court in Hewitt. 801 F.2d at 1099-1101. The California prisoners argue here, however, that Hewitt should not have governed the Ninth Circuit's analysis, because, they say, this case is factually different from Hewitt. The prisoners made similar claims

below, where the Ninth Circuit disposed of them appropriately. Id. at 1099-1100. The prisoners' efforts to inflate these perceived factual differences into important, unresolved issues of law should be rejected out of hand. There is no need to grant a writ of certiorari when the Court of Appeals applied and followed a recent and unmistakably clear decision by this Court, Hewitt, in reaching its decision in this case.

The prisoners' attempt to create a conflict between this Court's decision in Hill and the Ninth Circuit's decision about the standard for judicial review of state prison officials' administrative segregation decisions evinces a serious misapprehension of Hill and of the dictates of federal due process. The prisoners argue that the Hill "some evidence" standard of judicial review of prison disciplinary proceedings was incorrectly applied by the Ninth Circuit to judicial

review of prison officials' administrative segregation decisions. Their argument misses two important points.

First, Hill concerns the standard of judicial review of prison disciplinary proceedings required by the due process clause when loss of sentence reduction credits is involved. 105 S.Ct. at 2770, 2773. As even a cursory review of Wolff v. McDonnell, 418 U.S. 539 (1976) and Hewitt shows, the liberty interest in prison disciplinary proceedings likely to result in a loss of sentence reduction credits is entitled to much more due process protection than is a state-created liberty interest in remaining in a prison's general population, because the stakes are higher. The former involves the duration of imprisonment, and the latter involves only placement within a prison. It follows, therefore, that the standard of judicial review of administrative segregation decisions should not be more stringent than

the standard used for review of prison disciplinary proceedings resulting in the loss of sentence reduction credits. The prisoners simply have no reason to complain about the Ninth Circuit's application of the Hill standard of judicial review to state prison officials' segregation decisions.

Second, the prisoners overlook the fact that, in reviewing prison disciplinary proceedings, courts measure a factual determination with the some evidence standard. As this Court recognized in Hewitt, however, a decision to segregate a prisoner is based largely on subjective factors, "which are singularly unsuited for 'proof' in any highly structured manner." 459 U.S. at 474, 476, n. 9. For this reason, application of the Hill standard to segregation decisions substantially benefits, not harms, segregation prisoners.

The prisoners finally contend that the Court of Appeals' decision about the

quantum of process due a California prisoner placed in segregation conflicts with the Eighth Circuit's decision in Clark v. Brewer, 776 F.2d 226 (8th Cir. 1985). Their claimed conflict does not withstand scrutiny, because it confuses the Ninth Circuit's decision about due process for segregation placement decisions with an Eighth Circuit decision about due process for segregation retention decisions.

The thrust of the prisoners' contention here is that the Ninth Circuit erroneously limited due process requirements for segregation placement decisions to those required by Hewitt, because of claimed factual differences between that case and this case. In Clark, however, the plaintiff did not challenge his original placement in segregation. Clark v. Brewer, 776 F.2d 229-30. Rather, the prisoner in Clark claimed that once placed in segregation he was entitled to periodic review of his segregation status. Id.

The Eighth Circuit agreed and specified some generally informal, nonadversarial procedures for use in segregation retention decisions. 776 F.2d at 233-35. Thus, all of the prisoners' claimed conflicts (Petition, pp. 41-44) concern the purported differences between the procedures promulgated by this Court in Hewitt and the Ninth Circuit in this case for administrative segregation placement decisions, and the Eighth Circuit's procedures for segregation retention decisions.

Moreover, the Ninth Circuit agrees with the Eighth Circuit's conclusion that periodic review of segregation decisions is constitutionally required. Toussaint v. McCarthy, 801 F.2d at 1101. The Ninth Circuit, however, has not specified procedures for these periodic reviews, because it remanded that matter to the district court. Id. at 1101. The supposed conflict raised by the prisoners is thus

not ripe for review. For these reasons, there is no conflict between the Ninth Circuit's decision in this case and the Eighth Circuit's decision in Clark. Any conflict claimed by the prisoners here is simply a product of their misreadings of these cases.

CONCLUSION

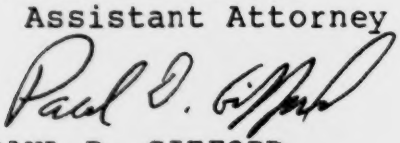
For these reasons, the prisoners' petition for writ of certiorari should be denied.

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